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Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF FOUNDATION FOR MORAL LAW AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

JOHN EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for Amicus Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Court of Appeals erred by failing to rule that the Affordable Care Act violates the Origination Clause of Article I, Section 7 of the U.S. Constitution and in ruling that the Affordable Care Act does not violate the Free Exercise Clause of the First Amendment?

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*, FOUNDATION FOR MORAL LAW

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the liberties guaranteed under the Constitution of the United States. The Foundation promotes a return in the judiciary and other branches of government to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded and the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Framers themselves, and the views of those who ratified the Constitution.

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this amicus brief. The consent of the counsel for Hobby Lobby and Conestoga is attached; all other parties have issued blanket consent. Further, pursuant to Rule 37.6, this amici curiae states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

The Foundation also believes that the Framers, because of their skeptical view of human nature, feared the concentration of government power in any one individual, branch, or level of government, and that they especially fear the power to tax. Like the Framers, the Foundation believes the power to propose new taxes should rest with that branch of Congress that most directly represents the people.

SUMMARY OF ARGUMENT

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. *Article I, Section 7, Clause 1*

The Origination Clause of Article I, Section 7 of the Constitution is not a mere formality. It reflects the Framers' fear of government power and their concern that one of the foremost government powers, that of taxation, should be carefully limited. The slogan, "no taxation without representation," was a rallying cry of the defenders of English common law and a major grievance of the American colonists. They enshrined this principle in the Constitution with the requirement that all bills for raising revenue had to originate in the House of Congress that most directly represented the people—the House of Representatives, as the Senate was composed of people chosen by their state legislators, not by the people.

In *National Federation of Independent Business [NFIB] v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566 (2012), the Supreme Court ruled that exaction imposed by the Affordable Care Act upon persons who choose not to purchase health insurance is a tax, because it has the basic characteristics of a tax rather than of a penalty: it raises substantial revenue, it does not punish illegal

activity, it does not involve a *scienter* requirement. *Amicus* also notes that the tax is paid into the general fund of the Treasury and it is not paid in exchange for government services.

The Senate cannot use a "shell bill" to circumvent the Origination Clause. Although the Senate has the authority to amend a House revenue bill, the amendment must be germane to the subject matter of the House bill. In this case, Senate Majority Harry Reid took H.R. 3590, a six-page double-spaced bill granting tax credits to military personnel seeking to purchase their first homes and increasing estimated taxes for certain corporations, deleted its language entirely, and substituted a 906-page single-spaced health care bill that was totally unrelated to anything in the original H.R. 3590. In no realistic sense did the Affordable Care Act originate in the House.

Because the individual mandate of the Affordable Care Act is a tax, and because it did not originate in the House, this Court should uphold the Constitution and strike down the statute.

The ACA also violates the Free Exercise Clause by forcing Hobby Lobby and Conestoga and their owners to either violate their religious convictions or give up a substantial state benefit, the right to do business as a private corporation.

ARGUMENT

I. THIS COURT SHOULD CONSIDER THE ORIGINATION CLAUSE ISSUE.

On June 28, 2012, when this Court announced its decision in *National Federation of Independent Business v. Sebelius*, ___ v. ___ (2012), it opened a new issue concerning the constitutionality of the

Patient Protection and Affordable Care Act (ACA). By ruling that the fees imposed by the ACA are in fact a tax—which the Administration and the ACA's supporters had steadfastly denied—the Court raised an issue that Hobby Lobby and Conestoga and other plaintiffs could not have anticipated when they filed their lawsuit: that the ACA is unconstitutional because it originated in the Senate instead of in the House as required of "All Bills for raising Revenue" according to Article I, Section 7.

Amicus recognizes that, as a general rule, federal appellate courts do not consider issues that were not raised in the lower courts. However, this Court has recognized that there are exceptions to this general rule, *Singleton v. Wulff,* 428 U.S. 106,120 (1986). As this Court said,

> Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis,* 369 U. S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering,* 312 U.S. at 312 U. S. 557. [Footnote 8].

As the Court said in *Hormel* at 557,

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure

> do not require sacrifice of the rules of fundamental justice.

This Court further stated that "It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here." And *Blair v. Oesterlein Machine Co.*,275 U.S. 220, 225 (1927), held that "It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here."

In *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999), the Fourth Circuit noted an exceptional circumstance that justifies review of an issue not raised below—

> when there has been an intervening change in the law recognizing an issue that was not previously available. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir.1981); *see also Pacific Ins. Co. v. American Nat'l Fire Ins.* Co., 148 F.3d 396, 403 (4th Cir.1998) (explaining that although a Rule 59(e) motion may be granted based on, inter alia, "an intervening change in controlling law," such "motions may not be used . to raise arguments which could have been raised prior to the issuance of the judgment . [or] to argue a case under a novel legal theory that the party had the ability to address in the first instance"), cert. denied, 525 U.S. 1104, 119 S.Ct. 869, 142 L.Ed.2d 771 (1999). The intervening law exception to the general rule that the failure to raise an issue timely in the district court waives review of

> that issue on appeal applies when "there was strong precedent" prior to the change, Curtis Publ'g Co., 388 U.S. at 143, 87 S.Ct. 1975 (plurality opinion), such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner, id. at 145, 87 S.Ct. 1975.

Curtis Publishing Co. involved a libel suit. At the time *Curtis* was tried in the district court, the prevailing state of defamation law was that the defendant must have acted negligently in publishing something that was false. But after the district court trial, the Court decided *New York Times v. Sullivan,* 376 U.S. 254 (1964), holding that a plaintiff who is a public official must show not just simple negligence but actual malice, that is, that the defendant published the statement either knowing that it was false or with reckless disregard for the truth. Curtis Publishing Co. then argued on appeal that they, like the New York Times, were entitled to the defense that they had not acted with reckless disregard for the truth. The Fifth Circuit held that Curtis was barred from raising this argument because it had not been raised in the district court; 351 F.2d 702, 713.

However, this Court held that "it was our eventual resolution of *New York Times,* rather than the facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a 'known right' before it was aware of the *New York Times* decision." *Curtis* at 388 U.S. 145. This Court came to this conclusion even though Curtis's attorneys were at trial fully aware of the pending *New York Times* litigation and the arguments raised therein, and some of them

were even involved in the *New York Times* litigation. *Curtis* at 144. This Court also noted in *Curtis* that it is much less likely to find a waiver when a constitutional right is involved:

> As our dispositions of *Rosenblatt v. Baer,* 383 U. S. 75, and other cases involving constitutional questions indicate, [Footnote 5] the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course, it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, *Michel v. Louisiana, supra,* at 350 U. S. 99, [Footnote 6] but an effective waiver must, as was said in *Johnson v. Zerbst,* 304 U. S. 458, 304 U. S. 464, be one of a "known right or privilege."

Curtis at 142-43.

The case at hand is similar to *Curtis* and the other cases cited above. This case was tried in the district court before this Court decided *NFIB v. Sebelius,* and *NFIB* represented a dramatic change in the case law concerning the Affordable Care Act. Although counsel for Hobby Lobby may have been aware of the *NFIB* litigation, this Court's conclusion in *NFIB* that the ACA could be justified as a tax was a complete surprise to everyone, probably even including the Obama Administration which had insisted throughout the passage of the ACA in Congress and thereafter that the ACA was *not* a tax. Hobby Lobby could not be expected to have anticipated this change in the case law.

Amicus urges this Court to consider this Origination Clause issue in this case because:

(1) The subsequent *NFIB* decision has effected a fundamental change in the case law affecting the ACA that Hobby Lobby and its counsel could not possibly have anticipated.

(2) Numerous lawsuits concerning the ACA are pending in many jurisdictions across the nation.

(3) The federal district courts and circuit courts of appeal have rendered many conflicting decisions concerning the constitutionality of ACA.

(4) As of this writing Congress and the President are at odds over whether to delay the implementtation of ACA, and questions concerning its constitutionality are a major part of this controversy.

(5) The lower courts, Congress and the President, state governments, and the American people are looking to this Court to resolve these constitutional issues so the Nation can proceed accordingly.

(6) The constitutionality of the ACA cannot be fully resolved until the Origination Clause issue is resolved.

The Origination Clause is based upon a cherished principle of the common law that Americans argued for in the Declaration of Independence, fought for in the War for Independence, and enshrined in the Constitution: **no taxation without representation.** The Origination Clause is therefore a central pillar of the American constitutional system.

II. THE HOUSE OF COMMONS IN ENGLAND

Parliament developed in medieval times from the Great Council (Magnum Concilium) which consisted of clergy, nobles, and "knights of the shire" who represented the various counties.[2] Their duty was to approve taxes proposed by the Crown. But often the Council demanded the redress of the people's grievances before they would vote on taxation, and thus legislative powers developed.[3]

The House of Commons developed into an legislative body distinct from the House of Lords in the late 1200s or early 1300s, when the "knights of the shire" who represented the counties and the burgesses who represented the towns began sitting in a separate chamber (later called the House of Commons) from that used by the nobles and high clergy (later called the House of Lords). During the "Good Parliament" of 1376, the Commons appointed Sir Peter de la Mare to convey to the House of Lords their complaints about excessive taxation, lack of accounting for royal expenditures, and mismanagement of the armed forces. This led to the creation of the office of Speaker of the House.[4]

According to the *Oxford Dictionary of Politics*, "House of Commons," "The 1689 Bill of Rights established for the Commons the sole right to authorize taxation and the level of financial supply to the Crown." Actually, the Commons had this

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[2] Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin 1946) 168-73.

[3] Brent Winters, *The Excellence of the Common Law* (Mountain Press 2006) 176-79; Taswell-Langmead 170.

[4] Taswell-Langmead 184-85.

authority as early as the reign of King Edward III (1327-1377)[5]; in 1348 the Commons gave a conditional grant of money to the King, but one of the conditions was that the king should thenceforth levy no "imposition, tallage, or charge by way of loan or in any other manner, without the grant and assent of the commons in parliament," and that this condition was to be entered on the roll "as a matter of record, whereby they may have remedy if anything should be attempted to the contrary in time to come."[6] The basic principle that underlay this concern was that the people who pay the taxes should have a voice in the adoption of those taxes.

III. THE CONCERNS OF THE AMERICAN COLONISTS

The American colonists shared the view of the Commons that there should be no taxation without representation and argued that because they had no representatives in Parliament, Parliament had no authority to tax them. As early as 1640-41 members of Parliament urged the Massachusetts Bay Colony to send delegates to Parliament, but the colonists refused, saying "if we should put ourselves under the protection of the Parliament, we must be then subject to such laws as they should make...[which] might prove very prejudicial to us."[7]

In the 1760s the taxation issue was fanned into flame with the Stamp Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, and the Intolerable Acts.

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[5] Winters 179-80.

[6] Taswell-Langmead 179.

[7] John Winthrop, *The Journal of John Winthrop 1630-1649* ed. Richard S. Dunn and Laetitia Yeandle (Harvard University Press 1996) 182-83.

Their opposition was based not on the amount of the taxes, but on the principle that Parliament had no authority to tax the colonists because the colonists had no representatives in Parliament. In 1765 the Virginia House of Burgesses adopted a resolution introduced by Patrick Henry which asserted that taxation without representation is tyranny:

> Resolved, that the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing characteristic of British freedom, without which the ancient constitution cannot exist.[8]

These taxes comprised one of the major grievances raised by the colonists in the Declaration of Independence ("For imposing Taxes on us without our Consent"). And the colonists took up arms to defend this principle.

IV. THE CONCERNS OF THE CONSTITUTIONAL CONVENTION

Taxes were a major concern of the delegates to the Constitutional Convention. When the delegates adopted the Sherman Compromise by which they established a two-house legislature, many wanted to be sure that only the house that represented the people who pay taxes would be allowed to initiate taxes. Elbridge Gerry of Massachusetts declared,

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[8] Patrick Henry, Virginia Resolves on the Stamp Act, 1765.

> Taxes and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.[9]

James Madison cited Benjamin Franklin of Pennsylvania as saying,

> [I]t was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.[10]

The report of the Compromise Committee on Representation chaired by Elbridge Gerry recommended this language:

> [A]ll Bills for raising or appropriating money and for fixing the salaries of the Officers of the Government of the United States, shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second branch—and that no money shall be drawn from the public

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[9] Elbridge Gerry, quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press 1937) II:278; James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, ed. Gaillard Hunt and James Brown Scott (Oxford University Press, 1920) 391.

[10] Benjamin Franklin, quoted in James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press 1984) 251.

> Treasury but in pursuance of appropriations to be originated by the first Branch.[11]

This language was adopted in July but stricken August 8. Subsequently, Edmund Randolph of Virginia offered similar language, adding that "the Senate will be more likely to be corrupt than the H. of Reps and should therefore have less to do with money matters."[12] George Mason declared that

> The arguments in favor of the proposed restraint on the Senate ought to have the full force. First, the Senate did not represent the *people,* but the *states,* in their political character. It was improper therefore that it should tax the people. ...Again the Senate is not, like the House of Representatives, chosen frequently and obliged to return frequently among the people. They are to be chosen by the states for six years.... In all events ... the purse strings should be in the hands of the representatives of the people.[13]

But this language was rejected on August 13, partially because his language restricted the Senate's authority to amend a tax proposal. On August 15 Caleb Strong of Massachusetts proposed that only the House of Representatives could initiate revenue bills but that the Senate could "propose or concur with amendments as in other cases."[14] On September 8 Strong's proposal was accepted with revised language, and the

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[11] Report of Compromise Committee on representation, quoted in Farrand I:524.

[12] Edmund Randolph, quoted in Madison, *Notes* 448.

[13] George Mason, quoted in Madison, *Notes* 443.

[14] Caleb Strong, quoted in Farrand II:298.

Origination Clause in its present form was adopted 9-2.[15]

As James Madison explained in *Federalist No. 58,*

> ...[A] constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes. The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse -- that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.[16]

And James Iredell, who would later serve as a U.S. Supreme Court Justice 1790-1799, argued in the first North Carolina ratifying convention that

> The House of Representatives...will represent the immediate interests of the people. They will originate all money bills, which is one of the greatest securities in any republican government. ... The authority over money will do everything. A government cannot be supported without money. Our representatives may at any time compel the

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[15] Farrand II:552.

[16] James Madison, *Federalist No. 58, The Federalist* ed. Michael Loyd Chadwick (Global Affairs 1987) 317.

> Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.[17]

The Framers placed the Origination Clause in the Constitution for a very important purpose -- to ensure that revenue bills must originate in the people's House -- the House of Representatives.

V. THE EFFECT OF THE SEVENTEENTH AMENDMENT

The ratification of the Seventeenth Amendment in 1913 did not change the meaning of the Origination Clause. It provides that the States shall choose their U.S. Senators by popular elections rather than by the state legislators. The Senators still represent the States, and they still serve six-year rather than two-year terms. The House of Representatives remains the body that most directly represents the people and that can be most quickly turned out of office by the people.

If the Framers of the Seventeenth Amendment had intended to repeal or modify the Origination Clause, they could have done so. But they left it intact. From this we must infer that they intended that its meaning and effect remain unchanged.

VI. THE COURTS, THE ORIGINATION CLAUSE, AND THE AFA

Court cases involving the Origination Clause are few, but from them several principles can be drawn.

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[17] James Iredell, quoted in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Lippincott Co. 1901) IV:39,129.

First, although the House of Representatives can enforce the Origination Clause by "blue-slipping" a bill and sending it back to the Senate, or simply by refusing to pass it, the House's failure to do so does not mean the Court should refuse to exercise judicial review:

> Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments .... Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review.

United States v. Munoz-Flores, 495 U.S. 385, 392 (1990).

Second, the Fifth Circuit has rejected the claim that Origination Clause cases are nonjusticiable political questions, *Texas Ass'n. of Concerned Taxpayers, Inc. v. U.S.*, 772 F.2d 163 (5th Cir. 1985).

Of all Origination Clause issues, the Courts have wrestled most with the question of what constitutes a "Bill for raising Revenue." *Amicus* urges a "plain meaning" construction and suggests that, to the reasonable man-on-the-street, a bill that takes money out of his pocket and places it in the government's coffers and/or is redistributed to other persons, is a bill for raising revenue. This is the way a reasonable person would have understood the Clause in 1787; this is the way a reasonable person would understand it today.

And in fact, the U.S. Supreme Court ruled in *National Federation of Independent Business [NFIB] v. Sebelius,* ___ U.S. ___, 132 S.Ct. 2566 (2012), that

the exaction imposed on persons who decline to purchase health insurance is a tax. *Id.* 2601. Distinguishing the Affordable Care Act (AFA) tax from the penalty imposed by the Child Labor Tax Law and invalidated by the Court in *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), the Court noted that:

(1) Unlike the "extremely heavy burden" imposed by the Child Labor Tax Law, the AFA tax will for most Americans be "far less than the price of insurance, and by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the 'prohibitory' financial punishment in *[Drexel].*" *NFIB* 2595-96. The Court noted that the Congressional Budget Office has estimated that four million people each year will elect to pay the tax rather than purchase health insurance. *NFIB* 2597.

(2) Unlike the *scienter* requirement of the Child Labor Tax Law which applied the penalty only to those who "knowingly employed underage laborers," there is no scienter requirement in the Affordable Care Act. As the Court said, "Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Id* 2595. As the Court stated,

> In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed. 506 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) ("[A] penalty, as the word is here used, is an

> exaction imposed by statute as a punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chose to pay rather than obtain health insurance, they have fully complied with the law.

Id. 2596-97. The Court said further, "We do not make light of the severe burden that taxation -- especially taxation motivated by a regulatory purpose -- can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* 2600.

(3) The penalties under the Child Labor Tax Law were enforced in part by the Department of Labor, "an agency responsible for punishing violations of labor laws, not collecting revenue." The tax on those who elect not to purchase insurance is "collected solely by the IRS through the normal means of taxation -- except that the Service is *not* allowed to use those means suggestive of a punitive sanction, such as a criminal prosecution." *Id.* 2596 (emphasis original).[18]

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[18] The Administration's gyrations over whether to call the ACA a tax suggest that the title given to the exaction in the Act bears little credibility. In late 2010, as the Administration arm-twisted and steamrollered to pressure Congress into passing the legislation, the Administration insisted it was not a tax, presumably because an additional tax would not be popular with congressmen and their constituents. During the *NFIB* litigation,

The Court in *NFIB* also noted that "Congress's choice of label" does not "control whether an exaction is within Congress's constitutional power to tax." *Id.* 2594. In *Drexel,* what Congress called a tax the Court determined was a penalty. In *United States. v. Sotelo,* 436 U.S. 268, 275 (1978), what Congress called a penalty the Court determined was a tax.

The Court also noted that the AFA tax was expected to raise substantial revenue for the U.S. Treasury. The tax would amount to about $60 per month ($720 per year) for individuals earning $35,000 per year and about $200 per month ($2,400 per year) for individuals earning $100,000 per year. *NFIB* 2596 fn 8. If the CBO estimate that four million people each year will pay the tax rather than h$2,880,000,000 per year if they all earn $35,000 per year or $9,600,000,000 per year if they all earn $100,000 per year. In either event, this is substantial revenue. Furthermore, the

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the Administration asked the Court "to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution." *Id.* 2594. Now, facing the possibility that a tax might violate the Origination Clause, the Administration again argues that it is not a tax.

The plain fact is, the Administration started with the Senate because if it had originated in the House before Senate approval, it would never have passed the House. The Administration wants to "have its cake and eat it too," and wants this Court to rule that the ACA *is* a tax under the Taxing and Spending Clause but that it *is not* a tax under the Origination Clause. The American taxpayers deserve better than this. If a bill is within the authorized powers of Congress under the Taxing and Spending Clause, it is subject to the constraints upon those powers under the Origination Clause.

Affordable Care Act involves multiple other taxes that will also raise revenue.[19]

Amicus notes, further, that the Court in *NFIB* upheld the ACA as a tax while also concluding that it could not be justified under the Commerce Clause or other portions of the Constitution. The Court's reasoning that led it to conclude that the ACA exaction is a tax is therefore central to its conclusion and therefore must be considered holding rather than dicta.

Other Supreme Court cases are distinguishable. *United States v. Munoz-Flores,* 495 U.S. 385 (1964), involved an assessment on persons convicted of federal misdemeanors which went to the Crime Victims Fund established by the Victims of Crime Act. The Court ruled that the assessment did not violate the Origination Clause because the assessments were not placed in the general treasury but rather were used to compensate crime victims. By contrast, taxes collected under the Affordable Care Act go directly to the general treasury as revenue.

Twin City National Bank of New Brighton v. Nebecker, 167 U.S. 196 (1897), involved a banking tax of $73.08. The bank argued that this tax was not in the bill as it was originally passed by the House but was added in an amendment by the Senate, with which the House later concurred. The Court upheld the tax, noting that the bill had originated in the House, and the Origination Clause specifically says "but the Senate may propose or concur with

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[19] Letter from Congressional Budget Office to Sen. Harry Reid, Nov. 18, 2009, available at http://cbo.gov.sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf. *Amicus* notes that estimates of the actual amount vary.

Amendments as on other bills." Unlike this banking bill, the Affordable Care Act originated in the Senate. Therefore, *Nebecker* does not apply to this case.

Millard v. Roberts, 202 U.S. 429 (1906), involved a law for the elimination of grade crossings and for a railway station in the District of Columbia. To finance this, the bill instituted a property tax in the District of Columbia. The primary issue was whether the law appropriated public funds for private purposes, but the Court dismissed an Origination Clause challenge on the ground that the funds raised were not for the general fund but for a specific project and were incidental to that project. Under the Affordable Care Act all tax moneys will go to the general treasury as revenue; thus *Millard* does not apply.

VII. CONGRESS INTERPRETS THE ORIGINATION CLAUSE

To some extent, Congress has policed itself concerning Origination Clause violations, although as noted earlier, Congress's failure to do so does not absolve the Court of its duty to exercise judicial review. *Munoz-Flores* 392.

The Senate has considered some of the finer points of what constitutes raising revenue:

* A bill is not for the purpose of raising revenue under the Origination Clause if it sets fees for services. The Senate has determined that a bill which included postal rates was not subject to the Origination Clause, reasoning that postal charges are not revenue because they are made in exchange for specific services.[20] The

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[20] Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States Including References to Provisions of the Constitution and Laws, the Laws, and Decisions*

tax imposed by the Affordable Care Act is not in exchange for any government services.

* A bill is more likely to be subject to the Origination Clause if the revenues are paid into the general fund of the Treasury rather than set aside for a specific purpose. The Senate has sustained a point of order against such a bill.[21] Revenues from the tax imposed by the AFA are paid into the general fund of the Treasury.

* The Senate has declined to consider a bill dealing with international oil commerce because import restrictions directly affect tariff revenues.[22] The AFA tax doesn't just affect tax revenues; it provides tax revenues.

The House has also protected its prerogatives under the Origination Clause by adopting resolutions "blue-slipping" legislative proposals, that is, returning them to the Senate without action. James V. Saturno, Specialist on the Congress Government and Finance Division, has written,

> Overall, House precedents indicate a wide spectrum of tax and tariff actions that have been excluded on the basis of the origination clause. [23]

The House and Senate themselves have invoked the Origination Clause in circumstances similar to the

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of the United States Senate, Vol. VI. Ch. CLXXXX (Washington: Government Printing Office 1977), § 317.

[21] Cannon § 316.

[22] Cannon § 320.

[23] James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (Congressional Research Service, The Library of Congress 2002) CRS-6.

case at hand. But the fact that the leadership of a Congress controlled by the same political party as the President, in a high-pressure and highly-partisan vote, failed to do so, does not absolve the courts of their duty to enforce the Constitution. *Munoz-Flores* 392.

VIII. THE USE OF A "SHELL BILL"

The Administration may justify its violation of the Origination Clause by claiming that, in fact, the Affordable Care Act did originate in the House. They will note that Senate Majority Leader Harry Reid (D-NV) took a bill that had been passed by the House, struck out all of its language, and inserted what became the Affordable Care Act in its place.

Amicus contends that the "shell game" of using a "shell bill" does not satisfy the Origination Clause, for the following reasons:

(1) The Affordable Care Act is completely unrelated to the original House bill. The House bill was House Resolution 3590, titled the Service Members Home Ownership Tax Act of 2009. The purpose of the bill was to grant tax credits to military personnel seeking to purchase their first homes and to increase corporate estimated taxes for certain corporations by 0.5%. It had nothing whatsoever to do with anything related to health care. The Senate's "amendment" deleted the House Resolution in its entirety and substituted the Affordable Care Act in its place. H.R. 3590 was a six-page, double-spaced bill. Senator Reid's "amendment" was a 906-page[24], single-spaced bill that bore no relationship whatsoever to the original House Bill.

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[24] The exact number of pages varies with the printing and formatting of the bill.

(2) A basic principle of parliamentary law is that an amendment must be germane to the main measure. According to *Robert's Rules of Order, Newly Revised,* "An amendment must always be *germane* -- that is, closely related to or having bearing on the subject of the motion to be amended. this means that no new subject can be introduced under pretext of being an amendment (see pp. 129-31)."[25] *Robert's* further states on pp. 129-31:

> DETERMINING THE GERMANENESS OF AN AMENDMENT. As already stated, an amendment must be *germane* to be in order. To be *germane,* an amendment must *in some way involve* the same question that is raised by the motion to which it is applied.[26]

Amicus cites *Robert's,* not necessarily because the Senate is strictly bound thereby, but because *Robert's* sets forth universal principles of fairness and orderliness by which deliberative bodies conduct their business. "Amending" a bill by striking its language entirely and inserting instead a totally new bill that bears no relationship whatsoever to the former, is simply not what people commonly understand the term "amend" or "amendment" to mean.

Let us also examine definitions from dictionaries published close to the founding era. Samuel Johnson's *A Dictionary of the English Language* (1768) defines "amendment" as "in law, a correction of an error

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[25] General Henry M. Robert, 1876; rev. Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised* (Perseus Publishing 2000) Art. VI, § 12, p. 125.

[26] *Robert's,* VI:12, pp. 129-31.

committed in a process."[27] Deleting a 6-page bill about tax credits for military personnel purchasing homes and inserting in its place a 906-page bill about health care hardly constitutes "correcting an error committed in a process." Noah Webster's *An American Dictionary of the English Language* (1828) uses a definition similar to Samuel Johnson's but adds an additional definition, "A word, clause or paragraph, added or proposed to be added to a bill before a legislature."[28] Clearly, the common understanding of the term "amendment" did not include substitution of a totally unrelated bill.

The Framers were deeply concerned that the power to tax be carefully and strictly limited to the legislative body that represents the people who pay the taxes. They would not have been impressed by the sophist argument that a "shell bill" fulfills the requirements of the Origination Clause.

IX. THE AFA ITSELF TREATS THE EXACTION AS A TAX.

Finally, Congress seems to have considered this Affordable Care Act exaction a tax. The AFA, § 10106(b)(1) states:

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[27] Samuel Johnson, *A Dictionary of the English Language 3rd. Ed.* (Dublin: W.G. Jones, 1768), "Amendment." *books.google.com/.../A_Dictionary_of_the_English_Language.html.*

[28] Noah Webster, *1828 An American Dictionary of the English Language* (1828; reprinted Foundation for American Christian Education 1995), "Amendment." Webster was younger than most of the Framers of the Constitution, but he knew many of them personally, sometimes dined with them during the Convention of 1787, and was commissioned by them to write a defense of the Constitution.

(b)(1) Section 5000A(b)(1) of the Internal Revenue Code of 1986,

as added by section 1501(b) of this Act, is amended to read as

follows:

"(1) IN GENERAL

—If a *taxpayer* who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the *taxpayer* a penalty with respect to such failures in the amount deter-

mined under subsection (c).".

(2) Paragraphs (1) and (2) of section 5000A(c) of the

Internal Revenue Code of 1986, as so added, are amended

to read as follows:

"(1) IN GENERAL

.—The amount of the penalty imposed by

this section on any *taxpayer* for any *taxable* year with respect

to failures described in subsection (b)(1) shall be equal to the

lesser of— ...[29]

Amicus notes that:

(1) The exaction is paid, not by a "person" or a "citizen," but by the "taxpayer."

(2) As noted earlier, the amount varies according to the taxpayer's income; this is more characteristic of a tax than of a penalty.

(3) Those whose income is so low that they do not have to file a federal tax return are exempt from the tax.

(4) Those who have not worked for the previous three months, those who have religious objections, those who are undocumented immigrants, those who are incarcerated, and those who are members of Indian tribes are exempt from the tax.

(5) The taxpayer pays this exaction, not at the courthouse, but on his/her regular federal income tax return.

(6) The AFA forbids the IRS from collecting the tax by aggressive efforts that are normally associated with penalties.

And, (7) Congress called this portion of the AFA an amendment to the Internal Revenue Code, and it is codified with the Internal Revenue Code at 26 U.S.C. All of this suggests that Congress, while using the cosmetic term "penalty," recognized that it is in fact a tax.

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[29] Public Law 111-148, March 23, 2010, www.gpo.gov/fdsys.pkg/ PLAW-111publ148/pdf/PLAW-111publ148.pdf (emphasis added).

X. THE ACA FORCES UPON RESPONDENTS AN UNCONSTITUTIONAL FREE EXERCISE DILEMMA.

Because other parties and amici have addressed the Free Exercise issue, *Amicus* will do so only briefly.

Thomas v. Review Board, 450 U.S. 707 (1981), involved a Jehovah's Witness who was fired from his foundry job for refusing because of religious conviction to build tank turrets. The Review Board refused to pay unemployment compensation, saying he had been fired for refusing to do the work assigned to him.

In keeping with its holding in *Sherbert v. Verner,* 374 U.S. 398 (1963), this Court reversed, holding at 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Citing *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972), this Court also noted that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."

The ACA forces Hobby Lobby and Conestoga, their owners, incorporators, officers and shareholders, into

the same dilemma as Thomas, Sherbert, and Yoder. They must either

(a) violate their religious convictions by providing contraception/aborfacients, or

(b) give up a substantial government benefit, the right to do business as a corporation, in these instances a private corporation.

This is precisely what the Free Exercise Clause prohibits, as this Court said in *Thomas* and *Sherbert*. And as in *Yoder*, even if this ACA provision could be considered neutral on its face, its application to Hobby Lobby and Conestoga is a free exercise and RFRA violation.

CONCLUSION

Speaking for a unanimous Court in 1819, Chief Justice John Marshall declared that "the power to tax involves the power to destroy." *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819). Like their predecessors in England and in the colonies, the Framers of our Constitution were wary about taxing powers and strove to limit those powers to the House of Congress that most directly represents the people who pay the taxes.

Despite the Administration's gyrations, the Supreme Court has spoken clearly and unmistakably: the insurance mandate of the Affordable Care Act constitutes a tax. It is therefore subject to the Origination Clause, and this Court should not allow a "shell game" subterfuge to defeat the intent and purpose of those who drafted and ratified that clause.

Amicus urges the Court to rule that the Affordable Care Act is unconstitutional, both in the insurance mandate and in its entirety, in violation of the Origination Clause and the Free Exercise Clause.

Respectfully submitted,

JOHN EIDSMOE
Counsel of Record
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

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Counsel for Amicus Curiae